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No. 84-663

In the Supreme Court of the United States

OCTOBER TERM, 1984

MARK G. MINNIS, PETITIONER

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

In a prior lawsuit between the parties, the district court stated as one of the multiple grounds for its decision that the invasion of personal privacy resulting from disclosure of the names and addresses of *recipients* of recreational boating permits on the Rogue River during the *1980* regulated season was not "clearly unwarranted" within the meaning of Exemption 6 of the Freedom of Information Act. The questions presented are:

1. Whether the prior ruling bars the government's contention in this action that disclosure of the names and addresses of *applicants* for recreational boating permits on the Rogue River during the *1983* regulated season would result in a "clearly unwarranted" invasion of personal privacy.

2. Whether the collateral estoppel doctrine requires that dicta or alternative holdings contained in judicial opinions be accorded preclusive effect in subsequent litigation between the parties to the original action.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statute involved 2

Statement 2

Argument 7

Conclusion 15

TABLE OF AUTHORITIES

Cases:

Allen v. *McCurry*, 449 U.S. 90 13

Church of Scientology v. *Department of the Army*, 611 F.2d 738 ..... 4, 5

Commissioner v. *Sunnen*, 333 U.S. 591 ..... 10, 11

Core v. *United States Postal Service*, 730 F.2d 946 9

Dozier v. *Ford Motor Co.*, 702 F.2d 1189 14

Halpern v. *Schwartz*, 426 F.2d 102 ..... 12, 13, 14

Limbach v. *Hooven & Allison Co.*, No. 83-96 (Apr. 18, 1984) 8

Minnis v. *United States Department of Agriculture*, Civ. No. 80-1138 (D. Ore. Apr. 16, 1981) 3

Mississippi University for Women v. *Hogan*, 458 U.S. 718 8

Montana v. *United States*, 440 U.S. 147 ..... 10, 11

Page

Cases—Continued:

Union Carbide Corp. v. *Commissioner,* 671 F.2d 67 ..... 10, 11

United States v. *Mendoza,* No. 82-849 (Jan. 10, 1984) 14

United States v. *Stauffer Chemical Co.,* No. 82-1448 (Jan. 10, 1984) 7, 10, 11, 13, 14

United States Department of State v. *Washington Post Co.,* 456 U.S. 595 ..... 4, 5, 6, 8

Westgate-California Corp., In re, 642 F.2d 1174 12

Williams v. *Ward,* 556 F.2d 1143, cert. dismissed, 434 U.S. 944 14

Winters v. *Lavine,* 574 F.2d 46 14

Statutes:

Freedom of Information Act, 5 U.S.C. 552 *et seq.* :

5 U.S.C. 552(b) 2, 9

5 U.S.C. 552(b)(6) 2, 3, 4, 5, 9

Wild and Scenic Rivers Act of 1968, 16 U.S.C. 1271 *et seq.* 2

Miscellaneous:

37 Fed. Reg. 13412 (1972) 2

Restatement of Judgments (1942) 12, 13

Restatement (Second) of Judgments (1982) 12, 13, 15

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OPINIONS BELOW

The opinion of the court of appeals, as amended on denial of petition for rehearing, is reported at 737 F.2d 784. The unamended opinion is reproduced at Pet. App. 4-15, and the court of appeals' amendatory order is reproduced at Pet. App. 2-3. The opinion of the district court (Pet. App. 16-29) is unreported. A judgment order of the district court entered in an earlier action between the parties (Pet. App. 34-37) is likewise unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 1984. A petition for rehearing was denied on July 18, 1984. The petition for a writ of certiorari was filed on October 15, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The Freedom of Information Act provides in pertinent part (5 U.S.C. 552(b)):

> This section does not apply to matters that are
>
> * * * * *
>
> (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy * * *.

STATEMENT

1. Petitioner owns the Half Moon Bar Lodge, a commercial enterprise on the south Bank of the Rogue River in Oregon. Since enactment of the Wild and Scenic Rivers Act of 1968, 16 U.S.C. 1271 *et seq.*, the Rogue has been designated as a wild and scenic river. The United States Forest Service of the Department of Agriculture maintains the portion of the River involved here and "its immediate environment in a natural, wild, and primitive condition essentially unaltered by the effects of man" (37 Fed. Reg. 13412 (1972)). The designated wild part of the River is open to public use for boating without restriction during the off season. Between Memorial Day and Labor Day, however, all persons floating down the River must either be accompanied by one of 41 qualified commercial guides, regulated by the Bureau of Land Management, or obtain an individual permit from the Forest Service (Pet. App. 5; ER 59).[1] Some 9,372 persons applied for permits to float the Rogue during the 1983 season (Pet. App. 5; ER 56-57). Of those, 639 were drawn at random to receive float permits (*ibid.*).

2. On February 28, 1983, petitioner's counsel wrote to the Forest Service requesting "copies of the names and addresses of the private permit trip *applicants* for the 1983

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[1] "ER" denotes the Excerpt of Record prepared for use in the court of appeals.

regulated Rogue River Season" (ER 23-24; emphasis added). The Forest Service denied petitioner's request on March 29, 1983, on the ground that the names and addresses sought were protected from disclosure by Exemption 6 of the Freedom of Information Act, 5 U.S.C. 552(b)(6), because disclosure would result in a "clearly unwarranted invasion of personal privacy" (Pet. App. 5; ER 27).

3. Petitioner then filed a complaint under the FOIA in the United States District Court for the District of Oregon, seeking an order requiring disclosure of the requested names and addresses. The district court held (Pet. App. 16-29) that Exemption 6 was inapplicable here and directed that the Department of Agriculture disclose the names and addresses.

a. A threshold issue in district court was whether the government was precluded from raising an Exemption 6 defense by the doctrine of collateral estoppel. In a prior FOIA action, petitioner had successfully compelled the Department of Agriculture to disclose the names and addresses of float permit *recipients* only for the 1980 season. *Minnis* v. *United States Department of Agriculture*, Civ. No. 80-1138 (D. Ore. Apr. 16, 1981) (Pet. App. 34-37). In its judgment order in the 1981 case the district court recited that it had (*id.* at 34-35)

> determined that the names and addresses of the private trip leader permittees for the regulated 1980 Rogue River season are not "similar" to personnel or medical files, that disclosure of the permittees' names and addresses would constitute a minimal invasion of personal privacy, that [petitioner] has a private commercial interest and the public has an interest in disclosure which outweighs the minimal invasion, that no alternative means for obtaining the information is available to

> [petitioner] * * * and that the requested information is not exempt from disclosure under [Exemption 6] * * *.

The government did not appeal from the district court's order in the 1981 action.

In the present action the district court rejected petitioner's collateral estoppel argument and proceeded to rule on the merits, explaining that "the facts and issues presented here are not the same ones decided previously by this court" (Pet. App. 21). The court noted that petitioner's FOIA request in the prior case had been limited to actual permit recipients, and that the government had presented evidence to show that the new request, for the names and addresses of all applicants, would not serve petitioner's purported objective of verifying the fairness of the lottery by which permit recipients are chosen. *Ibid.*

b. Turning to the merits, the district court concluded that Exemption 6 did not shield the requested information from disclosure (Pet. App. 22-29). Initially the court acknowledged (*id.* at 23-25) that, contrary to its ruling in the 1981 action (see page 3, *supra*), the intervening decision in *United States Department of State* v. *Washington Post Co.*, 456 U.S. 595 (1982), had established that the records sought by petitioner were covered by Exemption 6 in that they were similar to medical or personnel files. However, the court concluded that disclosure of the contents of these files would not consitute a clearly unwarranted invasion of personal privacy prohibited by Exemption 6. The district court balanced the relevant privacy interests against the supposed public benefits of disclosure, considering four factors identified by the Ninth Circuit in *Church of Scientology* v. *Department of the Army*, 611 F.2d 738, 746

(1979) (Pet. App. 22-23).[2] Although the district court recognized that petitioner's "private interest is a commercial interest in soliciting business for his lodge" (*id.* at 25), it discerned a "compelling" public interest in dissemination of information about accommodations available along the River (*id.* at 28). Because it regarded the invasion of privacy involved as "minimal" and saw "no alternative means by which [petitioner] can provide this information to this group of persons," the district court held that Exemption 6 did not protect the names and addresses from disclosure (*id.* at 28-29).

4. a. The court of appeals reversed (Pet. App. 4-15), holding that the names and addresses of the permit applicants sought by petitioner were protected by Exemption 6. The court noted that, under *Washington Post Co.*, the agency files containing the requested information were "similar files" within the meaning of Exemption 6 (Pet. App. 6-7). Furthermore, the court concluded that "the invasion of privacy here is 'clearly unwarranted.' 5 U.S.C. § 552(b)(6)" (Pet. App. 14). The court of appeals observed that petitioner's "principal interest in obtaining the permit applicant list is purely commercial in character. He wants to advertise his lodge to people who are interested in visting the Rogue River" (*id.* at 8). This purpose, in the court of appeals' view, did not "weigh in favor of mandating disclosure of a name and address list" (*id.* at 9).

The public benefits of disclosure touted by petitioner were found to be insubstantial (Pet. App. 10-11). Petitioner had argued that his advertising to persons disclosed to him under the FOIA would inform the public about accommodations along the River and would also allow him "to verify

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[2]These factors are: "(1) the plaintiff's interest in disclosure; (2) the public interest in disclosure; (3) the degree of the invasion of personal privacy; and (4) the availability of alternative means of obtaining the requested information." *Church of Scientology*, 611 F.2d at 746.

the fairness of the permit lottery system" (*id.* at 10). As to the first claim, the court of appeals found no public benefit because "some members [of the public] would be irritated rather than enlightened by unwanted solicitations" (*id.* at 10-11). The court also noted that there were numerous alternative means for petitioner to communicate his commercial message to the interested audience (*id.* at 11). As to scrutiny of the operation of the lottery system, the court of appeals found, on undisputed evidence, that disclosure of the names and addresses of permit applicants alone would not enable petitioner to verify the fairness of the system (*id.* at 11-12).

Moreover, the court of appeals found that "disclosure would implicate more than a minimal privacy interest" (Pet. App. 13). Disclosure would reveal various personal interests and could "subject[] the applicants to an unwanted barrage of mailings and personal solicitations" from other advertisers who could obtain the list (*id.* at 12-13).

b. The court of appeals also rejected petitioners' collateral estoppel argument. Initially, the court of appeals observed that the intervening inconsistent decision in *Washington Post Co.* prevented it from assigning preclusive effect to the district court's ruling in the 1981 action on the "similar files" issue. The court added that, in its 1981 ruling, the "district court never addressed whether disclosure would be 'clearly unwarranted.' " Pet. App. 15 n.1.

Petitioner then filed a petition for rehearing, observing (at 5-7) that the district court had in fact addressed the "clearly unwarranted" issue in its 1981 ruling, and arguing that the intervening decision in *Washington Post Co.* accordingly did not defeat operation of collateral estoppel. In response, the court of appeals amended its opinion (Pet. App. 2-3), deleting the statement that petitioner had challenged as erroneous. In its amended opinion the court of

appeals recognized that the district court had commented on the "clearly unwarranted" issue in its 1981 decision, but observed that those comments were unnecessary to the decision, and that they had been recognized as such by the district court. The court of appeals concluded that because these comments were mere dicta they had no preclusive effect in the present action. As a separate and independent reason for holding collateral estoppel inapplicable, the court of appeals observed that petitioner's first FOIA request had been limited to permit recipients whereas the one that gave rise to this suit extends to all permit applicants (Pet. App. 3).

ARGUMENT

Further review is plainly unwarranted here. Petitioner has not identified any decision of this Court or any court of appeals that conflicts with the ruling below as to the collateral estoppel effect of dicta or alternative holdings. Indeed, this Court's decision in *United States* v. *Stauffer Chemical Co.*, No. 82-1448 (Jan. 10, 1984), slip op. 3 n.2, supports the ruling below, and that ruling is also supported by substantial policy considerations. In any event, petitioner did not make the arguments advanced in this Court before the court of appeals; this case accordingly is an inappropriate vehicle for considering those arguments. Finally, the ruling below that is the primary object of the petition was itself merely an alternative ground for the court of appeals' decision. There is no substance to petitioner's challenge to the court of appeals' conclusion that the FOIA issue presented in this action is too dissimilar to the issue in the prior round of litigation to warrant application of collateral estoppel. Accordingly, there is no occasion even to consider the question whether dicta and alternative holdings can acquire preclusive effect.

1. a. Petitioner's argument is directed primarily (see Pet. 11-19) to an implicit premise of the court of appeals' ruling on the collateral estoppel issue — *i.e.*, that dicta or alternative holdings have no preclusive effect. But the challenged premise was itself only one of two independent and sufficient grounds for the court of appeals' decision. The alternate ground for the decision was that the FOIA requests underlying the two successive lawsuits were insufficiently similar to permit application of collateral estoppel to the question whether the disclosure sought would produce a clearly unwarranted invasion of personal privacy. See page 7, *supra*. Because this Court reviews judgments rather than statements in the opinions that underlie them, *Mississippi University for Women* v. *Hogan*, 458 U.S. 718, 723 n.7 (1982), there is no reason even to consider the issue primarily addressed by petitioner, unless it is established that the court of appeals' alternative ruling is itself subject to serious question and otherwise worthy of further review. But that ruling in fact is clearly correct and consistent with the cases cited by petitioner (Pet. 19-22).[3]

b. Contrary to petitioner's assertion (Pet. 19) this case does not present "the same legal and factual issues" decided in the prior round of FOIA litigation. As the district court and the court of appeals observed (see pages 3-4, 7, *supra*), the FOIA request in this case is significantly broader than that which gave rise to the 1980 case; petitioner apparently is now seeking disclosure of well over ten times as many names and addresses. Plainly the determination whether an invasion of personal privacy resulting from government

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[3]We do not understand petitioner to challenge the court of appeals' conclusion that no preclusive effect attaches to the district court's 1981 ruling on the "similar files" issue. See Pet. 5. In any event, the intervening decision of this Court in *Washington Post Co.* clearly robs the earlier ruling of any such effect. See *Limbach* v. *Hooven & Allison Co.*, No. 83-96 (Apr. 18, 1984), slip op. 9.

disclosures under FOIA is "clearly unwarranted" is itself highly fact-bound. In this context the far greater scope of the 1983 FOIA request amply establishes that the prior ruling does not preclude consideration on the merits of the present request. Moreover, it is particularly significant for Exemption 6 purposes that the present request extends to permit applicants as well as permit recipients. The balance of public and private interests that is required by Exemption 6 of the FOIA could easily be different for the two kinds of groups. Cf. *Core* v. *United States Postal Service*, 730 F.2d 946, 948-949 (4th Cir. 1984).[4]

In any event, the same district judge who ruled in petitioner's favor in the 1981 action sat on the present case as well. Her fact-bound determination that the inquiry in this case differed sufficiently from that in the prior case to

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[4]Indeed, petitioner claimed that part of his purpose for seeking the names of applicants was to verify the fairness of the lottery. Although the district court found this factor inconclusive (Pet. App. 21, 26-27), and the court of appeals concluded that the information sought was insufficient to allow petitioner to achieve his stated purpose (Pet. App. 11-12), the fact remains that assessment of this contention was an integral part of deciding whether disclosure was warranted under Exemption 6. Thus plainly the 1980 and 1983 requests were not interchangeable for FOIA purposes and the district court's 1981 ruling did not control the question presented for decision in 1983.

In the Statement section of the petition, petitioner appears to argue (Pet. 9-10) that his 1983 FOIA request for the names of all permit applicants should have been viewed, in effect, as two separate requests — one for the names of rejected applicants and one for the names of permittees. It apparently is petitioner's theory that the courts below should have given collateral estoppel effect to the district court's 1981 comments on the "clearly unwarranted" issue, as to the latter subgroup. See Pet. 22. But petitioner did not in fact frame his FOIA request in this manner, and while the Act authorizes disclosure of segregable nonexempt portions of partially exempt documents (5 U.S.C. 552(b)), petitioner cites no authority requiring agencies — or reviewing courts — to recast an applicant's request in the fashion implied here.

preclude application of collateral estoppel, which was concurred in by the court of appeals, does not warrant further review.

c. Petitioner errs in relying (Pet. 19-22) on *Commissioner* v. *Sunnen*, 333 U.S. 591 (1948). In *Sunnen* the Court took a narrow view of the scope of collateral estoppel (at least as it applies to tax litigation) (*id.* at 601; footnote omitted; emphasis added):

> [I]f the very same facts and no others are involved in the second case, a case relating to a different tax year, the prior judgment will be conclusive as to the same legal issues which appear, assuming no intervening doctrinal change. *But if the relevant facts in the two cases are separable, even though they be similar or identical, collateral estoppel does not govern the legal issues which recur in the second case.*

Sunnen thus contradicts rather than advances petitioner's argument concerning the standard for identity of issues necessary to invoke collateral estoppel.

Petitioner's reliance on *Union Carbide Corp.* v. *Commissioner*, 671 F.2d 67 (2d Cir. 1982), is likewise misplaced. In *Union Carbide Corp.* the Second Circuit, citing *Montana* v. *United States*, 440 U.S. 147 (1979), suggested (671 F.2d at 68) that the "separable facts" doctrine of *Sunnen* has been abandoned or moderated by this Court. Arguably that conclusion is supported — at least as to nontax cases —by *Montana*, see 440 U.S. at 158-163, and by *United States* v. *Stauffer Chemical Co.*, slip op. 4-7.[5] But there is

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[5]In *Stauffer Chemical Co.* the Court, citing *Sunnen*, reserved the question whether the separable facts doctrine may have special applicability in tax litigation. *Stauffer Chemical Co.*, slip op. 7 n.5. Thus *Union Carbide Corp.* — a tax case — may well entail an erroneous application of collateral estoppel.

no need here to explore whether and to what extent *Sunnen* remains good law because the ruling below does not rest on the separable facts doctrine. Rather, as we have explained above, the factual differences between the successive cases here are highly material to the legal issue presented for decision. Thus *Union Carbide Corp.*, in which the court determined that the "precise issue" (671 F.2d at 68) being litigated had previously been resolved adversely to the government in litigation with the same taxpayer, lends no support to petitioner's argument. Similarly, neither *Montana*, in which the Court found no "material[]" alteration of the pertinent "factual and legal context" (440 U.S. at 162), nor *Stauffer Chemical Co.*, in which the Court found that the government sought "to litigate twice with the same party an issue arising in both cases *from virtually identical facts*" (slip op. 7; emphasis added), supports petitioner's argument.

2. Petitioner's primary contention (Pet. 11-19) is that the court of appeals incorrectly declined to accord preclusive effect to statements in the district court's 1981 ruling addressing the "clearly unwarranted" issue — statements that petitioner characterizes as an alternative ground for that decision. Petitioner suggests that the court below erroneously followed recent decisions and scholarship suggesting that alternative holdings should be denied preclusive effect. As we have already explained, it would be unnecessary to reach this issue to sustain the court of appeals' judgment. But even if that were not so, there are numerous reasons why this case would provide no occasion for addressing the collateral estoppel effect of alternative holdings.

We note, preliminarily, that petitioner is correct insofar as he suggests that there is some disagreement among the lower courts and commentators as to whether a judgment predicated on alternate independent grounds is entitled to preclusive effect in subsequent litigation between parties.

As petitioner observes, the Restatement (Second) of Judgments adopts the position, contrary to that of the First Restatement, that such alternative holdings are not entitled to preclusive effect.[6] The Second Restatement follows the reasoning of the Second Circuit in *Halpern* v. *Schwartz*, 426 F.2d 102, 104-106 (1970). The Second Circuit there observed that because an alternative holding is, by definition, not essential to the judgment it supports, it may not have been afforded "rigorous consideration" (*id.* at 105). The court added that the presence of alternative grounds acts as a signficant disincentive to pursuit of appellate review by the losing party and accordingly undercuts an "important safeguard as to [the] correctness" of a judicial decision (*ibid.*). This is an inappropriate case in which to decide the question on which the First and Second Restatements disagree.

a. First, as petitioner concedes — indeed proclaims (Pet. 11, 23) — the "ruling" he challenges was made "without the benefit of briefing by the parties." The court of appeals' comments scarcely reflect a considered holding on the question of the preclusive effect of alternative holdings.[7] Rather, they were made in response to petitioner's rehearing petition, which pointed out a factual inaccuracy in the court of appeals' original opinion. See pages 6-7, *supra*. At no point in the proceedings below prior to entry of the order on rehearing did petitioner contend that alternative holdings are entitled to preclusive effect. Nor did petitioner seek leave to file a second petition for rehearing to place before the court of appeals the arguments raised in this Court.

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[6]Compare Restatement (Second) of Judgments § 27 comment i and reporter's note at 270 (1982), with Restatement of Judgments § 68 comment n (1942).

[7]Indeed, the Ninth Circuit appears to adhere to the rule announced in the First Restatement that assigns collateral estoppel effect to each of multiple alternative grounds for a decision. See *In re Westgate-California Corp.*, 642 F.2d 1174, 1176-1177 (1981) (dictum).

b. Second, the court of appeals did not purport even to comment on the question of the preclusive effect of alternative holdings, and the decision below will not be cited as precedent on that point. To the contrary, the court of appeals described the district court's comments on the "clearly unwarranted" issue in its 1981 ruling as "*dictum*" and emphasized that the district court "recognized that it was unnecessary for it to address that issue" (Pet. App. 3; emphasis added). So far as we are aware, there is no controversy as to the proposition that dicta are not entitled to preclusive effect in subsequent litigation.[8] And plainly this rule comports with the fundamental policy of collateral estoppel that limits preclusion to determinations that are essential to the judgments. Dicta, by their nature, pertain to issues not "conclusively determined in a prior action" (*Stauffer Chemical Co.*, slip op. 5). Petitioner ignores rather than disputes the court of appeals' characterization of the district court's 1981 comments as "dicta," rather than an alternative holding. In the circumstances, there is no reason to consider here whether alternative holdings should be given preclusive effect.

c. Were the question presented, strong arguments could be adduced for the rule that alternative holdings generally should not be given preclusive effect. The reasoning of the Second Circuit in *Halpern* v. *Schwartz*, see page 12, *supra*, is persuasive and in accord with the general rule that preclusion should be limited to matters that a party had full and fair opportunity to litigate in a prior action. See *Allen* v. *McCurry*, 449 U.S. 90, 95 (1980). It would be inconsistent with the objective of judicial economy, which preclusion is intended to serve, to require parties to take an appeal

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[8]On this point the Restatement (Second) of Judgments § 27 comment h and reporter's note at 269-270, continues the approach of the First Restatement, § 68 comment *o*.

challenging a judgment resting on alternative grounds simply to prevent one of those grounds from acquiring preclusive effect in future litigation. And such a rule would be especially inappropriate as applied to the United States. See *United States* v. *Mendoza*, No. 82-849 (Jan. 10, 1984), slip op. 6-7.

We note, as well, that in *Stauffer Chemical Co.*, this Court appears to have endorsed the position that petitioner challenges here. There Stauffer raised its estoppel argument for the first time on appeal in the second action, even though the first action had been decided in its favor by the district court before the second action was decided by the district court. This Court held that Stauffer's tardy assertion of collateral estoppel was permissible in the circumstances of the case, explaining (slip op. 3 n.2):

> Although the Wyoming District Court had decided *Stauffer I* by the time the Tennessee District Court decided this case, it had relied on alternate grounds for its decision. * * * By the time this case reached the Sixth Circuit, however, the Tenth Circuit had affirmed the District Court in *Stauffer I* solely on the ground [as to which estoppel was invoked by Stauffer].

Finally, the cases cited by petitioner (Pet. 16-18) do not in fact demonstrate any settled conflict among the courts of appeals. Rather, as petitioner himself observes (Pet. 16-17), decisions in the Second Circuit subsequent to *Halpern* v. *Schwartz* suggest that *Halpern* may be limited to its facts. *Winters* v. *Lavine*, 574 F.2d 46, 67 (2d Cir. 1978); *Williams* v. *Ward*, 556 F.2d 1143, 1155 (2d Cir.), cert. dismissed, 434 U.S. 944 (1977). Similarly, the District of Columbia Circuit has noted a divergence of views on this point but, as petitioner recognizes (Pet. 18), has found it unnecessary to decide the point. *Dozier* v. *Ford Motor Co.*, 702 F.2d 1189, 1195 (1983). On the other hand, *Halpern* itself suggests that

cases generally cited in support of the proposition that preclusive effect attaches to alternative holdings do not in fact support that general proposition. See 426 F.2d at 107 & n.4; see also Restatement (Second) of Judgments § 27 reporter's note at 270. Thus, resolution of the issue would be aided by further development in the lower courts. See *Mendoza*, slip op. 6.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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